Case Brief: Applications of Ecological Footprint to Saugeen Ojibway Nation Land Claims

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Style of Cause

Bruce County, Ontario v. Saugeen Ojibway Nation

This land claim case involves the ownership and recognition of traditional Saugeen Ojibway Nation (SON) lands in Ontario, currently owned by the provincial and federal governments. Ecological footprint and biocapacity measurements should be considered in determining the value of what has been dispossessed by surrendering SON lands to the British Crown. SON lays claim to 1.5 million acres of Midwestern Ontario since their traditional lands were stolen by the Crown in 1836 upon breaching Treaty promises. SON's traditional territory consists of the Saugeen (Bruce) Peninsula, the stretch of land from Goderich to Collingwood, and Georgian Bay and Lake Huron. The biocapacity of this region can be measured using metrics of ecological footprint to assess the resources that SON has lost. SON is seeking recognition of Aboriginal title and compensation for the Crown's failure to protect the land, broken Treaty promises, and breaching their fiduciary duty.

Facts of the Case

Section 35 of Canada's *Constitution Act, 1982*, states that Aboriginal title is an Indigenous land right protected under the law and refers to their inherent right to territory. This claim exists regarding Treaties 45.5 and 72, in which the British Crown pushed SON to surrender their traditional territory abundant with fertile soil and agricultural land. In 1836, Treaty 45.5 ceded 1.5 million acres of land to the Crown in exchange for the Crown to promise to protect the Saugeen Peninsula forever. This promise was broken in 1854. Through this claim, SON is seeking recognition of its ownership interests and a declaration stating that the Crown broke this promise. They say that the Crown misled them in negotiations regarding the surrender of the Saugeen Peninsula, thus leading to dispossession. They seek ownership of the land that has not been sold to third parties (ex: municipal roads & shorelines) as well as financial compensation.

Issues in the Case

In this case, the court must decide regarding the traditional lands of Saugeen Ojibway Nation and their dispossession by the Crown in 1836. SON is requesting a declaration saying that the Crown stole their lands and recognition of their interests. They are also seeking

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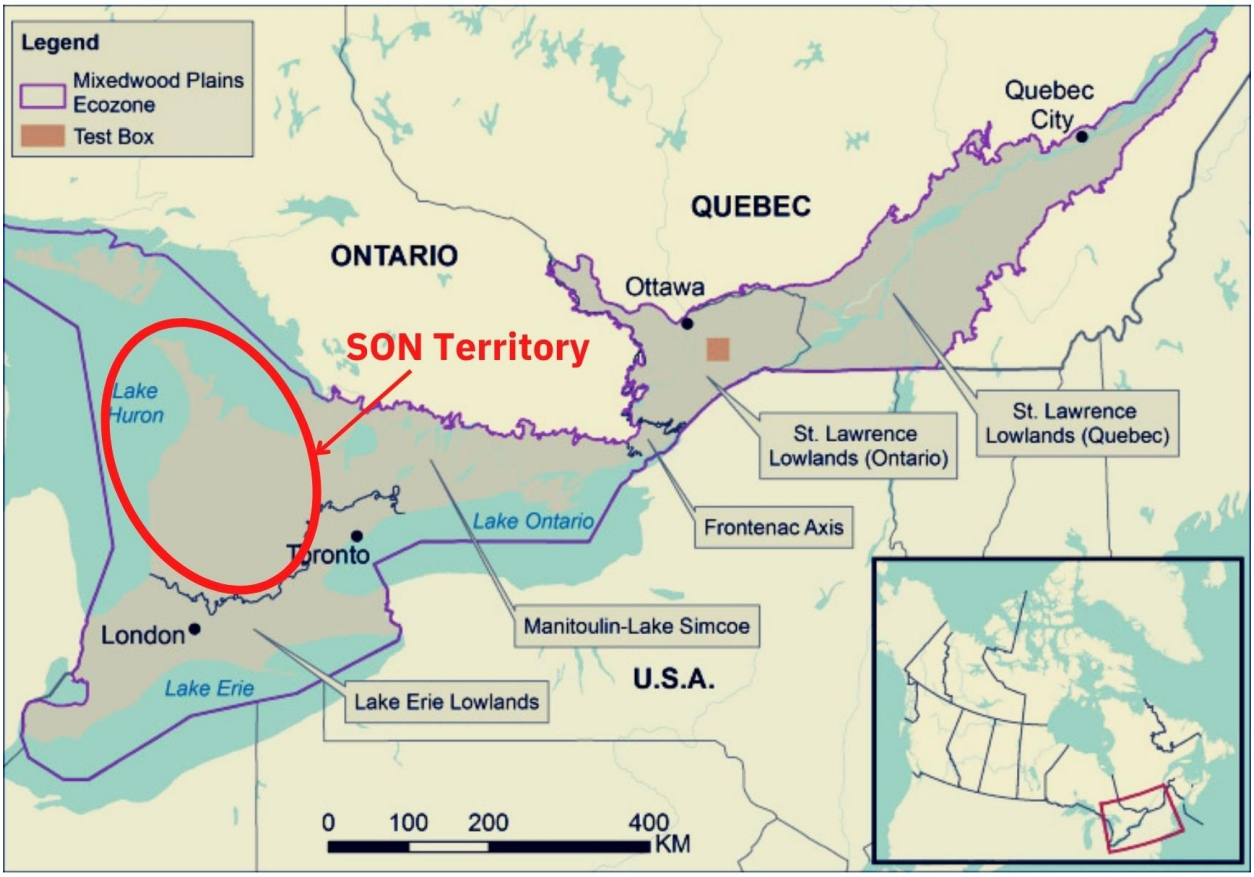
monetary compensation. The court must decide if they will receive a declaration or compensation and what that amount may be.

The amount of financial compensation can be decided by using the metrics of ecological footprint and biocapacity. This measures the amount of resources lost within the boundary of the claim. This can be done using the Ontario Footprint and Biocapacity Accounts which generate spatial data to assess the biological productivity of a region.

The Canadian municipal calculation strategy adapts national results to local communities and provides results comparable to the National Footprint and Biocapacity Accounts. It uses common data sets available to the public, such as the Provincial Assessment Report. To apply this to the claim, biocapacity would be measured by taking an inventory of the hectares of land. In this case, this is the 1.5 million acres (607,028.4634 hectares) surrendered just south of Owen Sound. The Ontario coefficients in the report are then applied to the number of hectares to generate global hectares of ecological footprint and related biocapacity measurements. Since SON territory lies in the mixed wood plains, information on the biocapacity of this ecozone can be used to evaluate the productivity of their traditional territory and its relevance to the claim.



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Ecological footprint is the sum of fishing grounds, cropland, grazing land, forest products, built-up land, and forest carbon uptake in an area and is measured in global hectares (gha). Biocapacity is a measurement of potential biologically productive lands that can sustain an ecological footprint.

The average biocapacity of the Saugeen Peninsula can be determined using Ontario's averages of biocapacity documented in the Provincial Assessment Report. This is due to the large land area (1.5 million acres) assessed through this claim. In 2015, Ontario's lands and waters provided 96.8 million global hectares of biocapacity. At the time the land was dispossessed from SON, the biocapacity of the region was likely much more productive given the lower amount of built-up land and presence of biologically productive forests, cropland, wetlands, etc.

	Global Hectares (gha) from Ontario Ecozone			Total	
Biocapacity Class	Hudson Bay Lowlands	Mixedwood Plains	Ontario Shield	gha	%
Forest: Dense	951,074	1,475,930	26,251,895	28,678,899	30%
Forest: Disturbed	558,151	-	7,095,666	7,653,817	8%
Forest: Sparse	477,518	257,598	3,800,966	4,536,082	5%
Cropland	-	19,627,409	767,122	20,394,531	21%
Grazing land	-	418,825	98,271	517,096	1%
Grassland	-	1,002,485	212,331	1,214,817	1%
Built-up	15,524	4,027,885	1,749,942	5,793,351	6%
Freshwater	1,670,082	4,208,177	9,646,365	15,524,624	16%
Wetlands: Peat Fens	2,481,897	2,484	986,664	3,471,045	4%
Wetlands: Peat Bogs	4,359,095	8,444	2,521,641	6,889,180	7%
Wetlands: Other	494,537	234,114	1,443,759	2,172,410	2%
Sum of all classes	11,007,878	31,263,351	54,574,622	96,845,851	100%
Proportion	11%	32%	56%	100%	

This table details biocapacity in global hectares by Ontario Ecozone. The total biocapacity of Ontario is 96,845,851 gha. The biocapacity of SON territory is estimated to be about the same as the mixed wood plains at about 31,263,351 gha. This is due to the region's similar proportions of land use types. This can be used to determine the value of SON traditional territories, particularly the value of resources lost through colonialism and the breaching of Treaty 45.

Legal Questions:

1. Did the Crown breach its promise indicated within Treaty 45.5?

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2. Does SON have a historical presence on the water/land involved in this claim?
3. Did SON exclusively and sufficiently use the region when the British Crown asserted sovereignty over the area?
4. Were the waters of Georgian Bay and Lake Huron used exclusively and sufficiently by SON during the time the British Crown asserted sovereignty over the area?
5. Did the Crown have a fiduciary duty? If it is found as such, did they break it?
6. Did the Crown protect the land as they said they would?
7. Do footprint and biocapacity metrics show the loss of physical land associated with the claim?

Holding

The decision released by the court involved two claims by the Saugeen Ojibway Nation (SON) and was decided by Justice Wendy Matheson of the Ontario Superior Court in 2020. She found that SON did not meet the test requirements under Canadian law for their Aboriginal title to be claimed to the waters of Georgian Bay and Lake Huron.

Rationale

The test calls for evidence of exclusive and sufficient use of the region when the British Crown asserted sovereignty over the area. Justice Matheson agreed that SON provided much evidence regarding their historical presence on the waters (ex: fishing and ceremonial practices), however, there was insufficient use, and occupancy of the whole area claimed. To make this decision, Justice Matheson applied the Tsilqot'in Nation Test, which is rooted in the precedent of another land title case and is based on the occupation of the claimed land prior to dispossession, which occurred in 1763. To have Aboriginal title, occupation must be continuous, sufficient and exclusive.

She agreed that there was a treaty promise breached by the Crown and said that they could have better protected the land and adhered to their agreement. She found that the Crown did indeed break the treaty agreement. Although this is the case, Justice Matheson disagreed with SON's statement that the Crown breached its fiduciary duty. A fiduciary duty is a responsibility of one party to another in which they must act in their best interests. She found no evidence of this relationship aside from their promise to honour treaty promises, which they failed to do.

This Treaty Claim is being heard in different phases. This court ruling was about declarations, and the next phase will be about remedies. The second phase will occur after the Court hears and decides all appeals. SON seeks compensation and recognition of their interests on the land, specifically those owned by Ontario, Canada, and roads and shorelines owned by municipalities named as defendants in the Treaty Claim. However, these municipalities argued that they should be excluded from the Treaty Claim. However, Justice Matheson ruled that this question is a matter for phase two.

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References

Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181.

Miller, E., Robinson, R., McMaster, M.-L., Holloway, E., and Kapoor, A. (2021). *Ontario's Ecological Footprint and Biocapacity: Measures and trends from 2005 to 2015*. Report submitted to the Ontario Ministry of Natural Resources and Forestry.

Saugeen Ojibway Nation Treaty and Title Claim - Okt: Olthuis Kleer townshend LLP. OKT. (2022, May 2). Retrieved September 1, 2022, from https://www.oktlaw.com/services/cases/son_titleclaim/.

Wilson, J., & J.L. Grant. (2009). *Calculating ecological footprints at the municipal level: What's a reasonable approach for Canada?* Local Environment. Dalhousie University. DOI:10.1080/13549830903244433.

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